U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 10May2002

CASE NO.: 2001-LHC-01796
2001-LHC-01797

OWCP NO.: 07-152912
07-159449

IN THE MATTER OF

SHARON DONALD,
Claimant

v.

INGALLS SHIPBUILDING, INC.,
Employer,

APPEARANCES:

ROBERT YOUNG, III, ESQ.
On behalf of the Claimant

PAUL B. HOWELL, ESQ.
On behalf of the Employer

Before: LARRY W. PRICE
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, et seq., brought by Sharon Donald (Claimant) against Ingalls Shipbuilding, Inc. (Employer). Employer is a self-insured corporation.

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. A formal hearing was held in Metairie, Louisiana, on January 7, 2002. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs.[1]

Based upon the stipulations of the parties, the evidence introduced and the arguments presented, I find as follows:

I. STIPULATIONS

During the course of the hearing the parties stipulated and I find as related to Case No. 2001-LHC-01796; 2001-LHC-01797 (JE-1):

1. Jurisdiction of this claim exists under the LHWCA, 33 U.S.C. § 901 et seq, since she was engaged in constructing Naval vessels alongside the navigable waters of the Gulf of Mexico in Pascagoula, Mississippi, at Ingalls Shipbuilding, Inc.

2. Dates of injury/accident: April 29, 1999, and February 19, 2001.

3. Injuries occurred within the course and scope of the employment: Yes.

4. Employer/Employee relationship existed at the time of the accidents: Yes.

5. Employer was advised of the injuries on April 29, 1999, and February 19, 2001.

6. The Notices of Controversion (LS-207) were filed on February 17, 2000; February 28, 2000; August 1, 2000; August 15, 2000; December 8, 2000; and February 26, 2001.

7. Date of Informal Conference: January 21, 2001.

8. Average weekly wage at the time of the injuries: $579.95 and $618.30, respectively.

9. Nature and extent of disability:

(a) Temp. total disability paid: April 30, 1999 to May 6, 1999 - $386.64
May 26, 1999 to June 15, 1999 - $1,159.95
January 14, 2000 to January 16, 2000 - $165.72
January 20, 2000 to February 6, 2000 - $994.24
February 24, 2000 to July 4, 2000 - $7,291.13
August 11, 2000 to November 30, 2000 - $6,186.40

(b) Permanent partial disability paid:

[1]References to the transcript and exhibits are as follows: Transcript - TR. ___; Claimant's Exhibits - CX.___, p.___; Employer's Exhibits - EX. ___, p. ___; Joint Exhibits - JE. ___.

Non scheduled - December 1, 2000 to January 21, 2001 - $1,165.78
Scheduled - 7% leg disability - $7,794.86

(c) Total benefits paid: $25,644.93.

10. Permanent disability: Yes. Percentage: Disputed.

11. The dates of maximum medical improvement are disputed.

II. ISSUES

1. Choice of physician/authorized medical
2. Nature and extent of disability

III. STATEMENT OF THE CASE

Summary

Claimant injured her knee and her shoulder at work on April 29, 1999. Employer referred her to Dr. Cockrell, an orthopedist near her home, for treatment. Dr. Cockrell performed surgery on her knee twice and treated her shoulder. Claimant returned to work after the first surgery and was given modified employment after her second surgery. Claimant injured her knee a second time on February 19, 2001, and has not returned to work since that time. She alleges that she was denied her choice of physician and that she has not reached maximum medical improvement. I must determine whether a physician was ever chosen, whether she can change her physician, and the nature and extent of her disability.

Facts

Claimant's Testimony

Claimant is a 33-year old mother of three who resides in Mobile, Alabama. (TR.14). Her formal education consists of a GED and taking several college courses. (TR.15). Claimant began working for Employer on April 6, 1998, as a shipfitter. (TR.15-16). She had previously worked as a waitress and bartender at clubs. She was an assistant manager, performing such duties as payroll and inventory at one position. (TR.15,42). Claimant also worked as a security guard for the 14 months preceding her position with Employer. (TR.44).

Claimant worked for Employer as a shipfitter for approximately a week before being assigned as a burner, her position at the time of her first injury. (TR.16). As a burner, Claimant had to carry an approximately 75 to 80 pound line with her everywhere and squat or stoop regularly. (TR.19).

On April 29, 1999, her first accident occurred when she fell on the left side of her body, hitting her left shoulder and her right knee. (TR.18). That day, Claimant was taken to the emergency room at Singing River Hospital. The next day, she saw Employer's physician, Dr. Warfield. (TR. 20,49). Claimant avers that she complained of knee, left side and shoulder problems at that time and continues to suffer the same symptoms. (TR.21,25,55). However, Dr. Cockrell, an orthopedist who subsequently treated Claimant, did not treat her shoulder symptoms until August 11, 2000. (TR.31). Claimant testified that Dr. Cockrell explained that he was paid to treat the knee only. (TR.55). She denied previous injuries to her right knee or left side or left shoulder. (TR.21).

Five days after the accident, Claimant signed a medical authorization form for an orthopedic specialist. At that time, Claimant did not know any orthopedists. Therefore, a lady from Employer's workers' compensation department suggested Dr. Cockrell, who's office was located near Claimant's home. (TR.22).[2] No doctor's name was on the medical authorization form when Claimant signed it. However, Claimant admitted that she understood that an appointment would be arranged to see Dr. Cockrell, who's name was subsequently filled in as her choice of physician. (TR.22-23, 52; EX.4, p.1).

Dr. Cockrell performed surgery on Claimant's knee on May 26, 1999. After this surgery, her leg was weak and she experienced pain and swelling. (TR.25,61). Claimant returned to work as a burner on June 16, 1999. (TR.26,61). This work involved extensive climbing and overhead work. Claimant also had to catch six foot clips to prevent them from falling on people working below. She testified that these activities caused a lot of pain. (TR.26). Claimant testified that she was assigned to work as a flame-gouger, a shipfitter and as a grinder during this period. (TR.41).

In late October or early November, 1999, Claimant complained orally to Employer's representative about Dr. Cockrell's treatment. The representative informed Claimant that she had to continue treatment with Dr. Cockrell because he was her choice of physician. (TR.27). Claimant claims that she did not know she had a right to choose her own physician under the Act until she spoke to a Department of Labor representative after the second leg surgery. (TR.29). The leg locked up in December, 1999, and a second orthoscopic leg surgery was performed on January 21, 2000. (TR.25,28,64). The Department of Labor sent Claimant to Dr. Murphy in New Orleans for an independent medical evaluation on March 28, 2000. (TR.29-30).

Claimant testified that before her second accident on February 19, 2001, Dr. Cockrell told her that she had arthritis and that he could do no more for her shoulder and knee pain. Thereafter, she went to Dr. Hillier. She saw him twice. (TR.35). Claimant alleged at her May 10, 2001 deposition that Employer refused a request to see Dr. James West in Mobile. (EX.30, p.30; EX.23, p.4). However, on June 26, 2001, Employer authorized her to make an appointment with Dr. West for examination. (EX.23, p.1). Claimant first saw Dr. Hillier on February 14, 2001, upon her attorney's advice. Dr. Hillier is in Bay St.

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[2]Employer entered a copy of the Orthopedic Specialists section of the Mobile phone book which shows there are over 30 Orthopedic specialists practicing in the Mobile, Alabama, area. (EX.23, p.3-4).

Louis, Mississippi, approximately one and a half hours by car from Claimant's home in Mobile, Alabama. (TR.84).[3] After the second visit, Dr. Hillier opined that Claimant should not return to work. (TR.38).

Claimant returned to work the day after the second orthoscopic surgery on January 22, 2001. She was classified as a grinder. (TR.36). However, she was initially placed in the shipfitting department where she worked standing at a booth, tacking things together on the side of a ship. (TR.37-38). During this period, Claimant also swept and burned. (TR.78). At her deposition, she stated that she had a different job assignment each day. (CX.30, p.34). By February 19, she was arc gouging when her knee locked up again and she experienced her second injury. Claimant testified that gouging is more physically demanding work than grinding. (TR.38,40,85). She alleged that in order to perform her duties on February 19, she had to kneel in order to reach the spot she was working on. (TR.87). She testified at her deposition that she did not know what she was doing because she had just started arc gouging. (EX.30, p.35). She alleges that when she asked her supervisor at the time, Dearing, to take a break, he informed her that there were no breaks for restricted people and denied her a break. (EX.30, p.35; TR.87). Despite her injury, Claimant refused to go to the hospital on February 19, 2001. She drove home instead. (TR.91). February 19, 2001, was the last day she worked for Employer. (TR.37). Thereafter, she did not return to Dr. Cockrell until compelled to do so on July 6, 2001. (TR.92,95; EX.28). She last saw Dr. Hillier in February, 2001. (TR.96).

Claimant never met with Employer's vocational consultant, Tommy Sanders, upon her counsel's advice. (TR.73-74). Sanders performed a job survey for her anyway and sent the results to Claimant in December, 2000. (TR.77). She never applied for any of the positions identified. (TR.74). Claimant testified that during the Summer of 2001, she applied for positions at the Dollar Store, Dollar General, Family Dollar, Chevron, Cleveland Florist, Wal-Mart, K-Mart, and BP Gas, among others. (TR.74-75). When applying for these jobs, she told potential employers of her restrictions. (TR.104).

Barbara Wiley

Wiley is Employer's employee relations representative. She assists injured employees with work restrictions to return to work in Employer's return to work program. (TR.115). In describing the program, Wiley explained that injured employees are given work in the temporary light duty program when their doctors release them for work. They work according to their restrictions. Employees are allowed to remain in this program up to 56 days. Thereafter, Employer attempts to place permanently restricted workers at positions within their craft through the return to work program. (TR.117-118).

When Claimant returned to work with permanent restrictions on January 19, 2001, she was limited to minimal ladder climbing, lifting no more than 60 pounds, no sustained overhead work and minimal squatting. (TR.120,148). Wiley disputed Claimant's testimony that she was placed as a

[3]Bay St. Louis is approximately 67 miles from Pascagoula/Cross Point and 95 miles from Mobile. The Rand McNally Road Atlas, p.5,52 (1983).

shipfitter, testifying that she recorded Claimant in the burning department. Claimant had to go through the training center to

be a burner. She had previously been a flame arc-gouger. (TR.121). Wiley also professed surprise at Claimant's allegation that she was not allowed to take breaks. (TR. 119). She explained that an injured employee could go to their union representative for relief if they were not allowed to take breaks. (TR.120).

Claimant never complained about her assignments to Wiley. (TR.123). However, Claimant called Wiley on February 16. She was angry and wanted to speak to Joe Walker. (TR.123). Claimant complained that Walker was not counseling her properly and she was worried about her job title. Wiley explained that Walker's job is not to counsel her but to ensure that her rights are protected under the Act. Claimant ended the conversation and called again later in the day to complain of severe pain. (TR.124). Claimant did not know whether she would be able to continue working at that point and Wiley reminded her to get a doctor's excuse to cover lost time. (TR.125).

Wiley testified that it was out of character for Dearman, Claimant's supervisor, to make a worker perform beyond medical work restrictions. (TR.126). Dearman had informed Wiley that Claimant had been performing low work. However, Wiley explained that many injured employees perform low work without squatting by sitting on a bucket or flat on their bottoms in order to reach the low areas they are working on. (TR.127,129). Dearman had also informed Wiley that Claimant had complained of knee pain and had requested a break. Wiley explained that Claimant could take breaks but that Dearman could not authorize breaks because Employer does not have scheduled breaks. (TR.128,137).

Wiley testified that the position Claimant was offered was still available at the time of trial. (TR.129). Claimant was terminated for absenteeism on March 2, 2001, after she failed to report for work after February 19. Wiley explained Employer's policy that required employees to provide an excuse for absences within five days to avoid dismissal. Claimant provided no such excuse. (TR.130).

Joseph Walker

Walker is a vocational rehabilitation counselor with the U.S. Department of Labor. (TR.144,146). He has been the designated counselor for Employer's Return to Work Program since 1989 and monitored the suitability of Claimant's alternative employment with Employer from January 22 to February 19, 2001. (TR.144-145).

When he contacted Employer's hull department, he was informed that Claimant was working as a burner or gouger in the bays or was at the training re-certification center working either as a burner or a shipfitter or both. Walker went to the re-certification center on January 23 to follow up with Claimant's supervisor. (TR.149). He observed Claimant performing tack welding under the shipfitter combination classification. Claimant's supervisor and instructor were aware of Claimant's restrictions. (TR.150). Walker met with Claimant and discussed her case. Two Metal Trades Union representatives interrupted the meeting to discuss Claimant's occupational classification. (TR.151;

EX.20, p.5). After the re-certification center, Claimant was placed in the shell shop working as a burner and flame-gouger. According to Walker, this work was less strenuous than Claimant's assignment before the accident. (TR.152). After working in the shell shop, she worked at Platen Number 7 for Dearman. Walker testified that this work was less strenuous than Claimant's pre-accident work as well. (Tr.153). He believed that

the work Claimant was assigned between January 22 and February 19, 2001, including the work she was doing at the time of her second injury, fit her restrictions. (TR.155,160-161). He qualified this assessment by clarifying that a worker in Claimant's position might have to change posture to meet her restrictions while at Platen Number 7. (TR.160,177). He explained that Claimant could avoid squatting and accomplish her work within restrictions by taking breaks, sitting on a bucket or some other material and changing positions. (TR.161,178). Walker also opined that the positions identified in Tommy Sanders' job survey were suitable for someone with Claimant's age, education, work experience and skills. (TR.161).

Walker testified that Claimant was open and receptive in his first two meetings with her, though she was worried about her administrative status regarding her work restrictions. Claimant was concerned about medical issues and occupational classification. Though still cooperative, Claimant presented a more cynical attitude at the third meeting. (TR.162,164).

Tommy Sanders

Sanders is a certified rehabilitation counselor who performed a vocational assessment of Claimant for Employer. (EX.18, p.2-3). Sanders attempted to interview Claimant and set a tentative appointment with her. However, Claimant subsequently attained an attorney who advised Sanders that Claimant would not participate in vocational rehabilitation until certain issues were resolved. (EX.18, p.4).

Sanders submitted a report and hypothetical labor market survey to Employer on December 1, 2000. In that report, he cited Dr. Cockrell's and Dr. Setzler's reports. (EX.18, p.4). He noted Dr. Cockrell's restrictions of minimal squatting and climbing, no sustained overhead work and no lifting over 60 pounds. Based on these restrictions and Claimant's prior work history and skills, Sanders conducted a job survey. (EX.18, p.5,8). He identified three (3) available jobs at that time. All of the prospective employers were willing to consider Claimant with her age, education, work history and skills and medical restrictions. (EX.18, p.6).

A gas station in Mobile was accepting applications for a cashier position that paid $6 per hour for a 36-hour week. Duties included operating the cash register, balancing the drawer, sweeping and mopping as needed, wiping the area around the drink dispenser, light restocking, and refilling the windshield cleaning water dispensers by the pumps. This position required frequent lifting and carrying of five to six pounds, occasional pushing and pulling of five pounds, occasional sitting, frequent to constant standing/walking, and occasional bending and squatting. (EX.18, p.6).

A parking lot in Mobile was accepting applications for two booth attendant positions that paid $5.25 per hour for 40-hour weeks. Duties included issuing parking ticket tags from the booth and

completing shift reports. Workers would have to give customers a stub and place a tag on their vehicles' windshields and recover them when customers left. This position required occasional lifting or carrying five pounds, occasional sitting, frequent standing or walking and handling. No frequent squatting or overhead work was involved. (EX.18, p.6).

A security firm in Moss Point was accepting applications for a gate guard position paying $7 per hour for 40-hour weeks. The position was available until December 15, 2000. Duties included logging vehicles and individuals in and out at a gate. This position involved negligible lifting, occasional standing and walking, frequent sitting and handling, and no squatting or overhead work activity. (EX.18, p.6).

Sanders also reported his investigation into Claimant's job duties on February 19, 2001, the date of the second accident. Sanders had met with Dearman, Claimant's supervisor on February 19, and visited 7 Platen, where Claimant had been working. On February 19, Claimant was working as a gouger. Sanders noted that Claimant used a burning torch and a carbon torch. He lifted a torch and estimated it to weigh approximately 5 pounds. According to Dearman's notes, Claimant had initially gouged a ten foot butt weld in one hour and 20 minutes. (EX.18, p.10). Sanders observed a similar butt weld that was approximately calf high from the deck/ground. (EX.18, p.10-11). Dearman demonstrated that the gouging could be performed from a forward flexed position or from a squatting or kneeling position. Dearman explained that it normally takes 15 to 30 minutes to gouge 10 feet. After completing the 10 foot gouge, Claimant had been assigned to gouge two halves of penetration together that had been placed on a work bench. The work bench was approximately 36 inches off the ground. After completing this task, Claimant was assigned to gouge an approximately eight foot weld slightly above the ground. She then cut strongbacks from a plate of steel adjacent to the butt weld. At that point, Claimant indicated that she had been on her knees all day. Dearman had responded that he needed the work activity accomplished. Dearman returned to his office and was informed within a few minutes that Claimant was injured. Dearman informed Sanders that he did not know whether Claimant had squatted, kneeled, or gouged from a forward flexion position. Sanders concluded that any required squatting that day would have lasted one and a half hours and that the gouging could have been performed from a forward bending position and alternating squatting. He concluded that these activities were within her work restrictions and suggested contacting Claimant's doctor in order to delineate minimal squatting. (EX.18, p.11).

Sanders performed a follow up hypothetical labor market survey dated December 12, 2001. (EX.18, p.13). He identified four (4) positions at that time. (EX.18, p.14).

A hotel was accepting applications for a desk clerk trainee paying $6 per hour for a 32-hour work week. Duties included greeting and registering guests, assigning rooms, issuing keys, maintaining records of vacancies, computing bills, collecting payments and completing shift reports. The hotel would train successful applicants to use the hotel computer system for data entry. The position involved sedentary to light physical activity with occasional 5 pound lifting, frequent sitting and handling and occasional walking and standing. No climbing, frequent squatting, or overhead work was required. (EX.18, p.14).

The hotel was also hiring a night auditor trainee for a 32-hour week at $6.50 per hour. Duties included verifying and balancing entries of financial transactions. The position required using a calculator and computer. Training was provided and successful applicants would be cross trained as desk clerks. (EX.18, p.14).

A security firm in Mobile was hiring eight (8) full and part time security guards and paying $5.90 to $6.50 per hour. Duties were assigned according to contract. Four (4) of the openings were for rover
guards working at various sites at $6.50 per hour. Some positions were for gate guards, while others combined gate guard duties with walking rounds. There was alternate sitting, standing and walking with occasional lifting of 2 pounds. Three (3) of the positions were at a hospital and included primarily standing and walking rounds on evenings and nights for $5.90 per hour. Applicants had to pass a police and background check and possess a valid drivers' license as well as be available to work any shift. (EX.18, p.14).

Another security firm was hiring six (6) full and part time security guards at $5.50 per hour. Duties varied from site to site. One position was at an emergency room and involved assisting patients to proper areas. These positions involved frequent walking and standing with occasional lifting up to two pounds. Training was provided and applicants were required to possess a drivers' license, phone and transportation. (EX.18, p.14). Sanders noted that the first security firm generally hires several security guards each month and that a convenience store had hired several full and part time cashiers at $5.50 per hour since his December 1, 2000 report.

James Cowart

Cowart is a vocational rehabilitation counselor who wrote a vocational disability report for Claimant at her request on January 2, 2001. (CX.16, p.1). Cowart interviewed Claimant by telephone on January 2, 2002, and reviewed medical records from Drs. Cockrell, Murphy, Setzler and Hillier. (CX.16, p.2-3). Cowart also reviewed vocational disability reports from Sanders and Walker. (CX.16, p.3). After interviewing Claimant and reviewing the medical records, Cowart concluded that Claimant could not perform the accommodated job full time for an extended period of time. However, he predicted that she could initially earn $240 to $260 per week in the Mobile and Baldwin counties economic area. (CX.16, p.1,6).

Medicals

Employer's Infirmary Records

Claimant was seen at Employer's infirmary on April 29, 1999, the date of the first accident. Claimant reported twisting her knee after slipping and falling. Obvious swelling and deformity to the right patella was noted. Left arm and torso symptoms were not noted. (EX14, p.1).

When Claimant returned to the infirmary the next day, she reported her right knee as her main injury. However, she also reported problems with her entire left torso. Physical examination revealed soft tissue edema in the right knee and a tender left arm muscle. Left shoulder and arm symptoms were noted on May 3 and 4, 1999. (EX.14, p.2).

On February 19, 2001, the date of the second accident, physical examination of the right knee showed some edema and tenderness on palpitation to the mid knee and posterior knee area. Claimant was very vocal about her pain and the knee was tender medially, but no diffusion or instability was observed. Claimant claimed that she could not bear weight on her right knee, but refused to go to the emergency room
and stated that she could drive herself home if someone helped her to her car. Dr. Warfield noted that examining the knee was made difficult by Claimant's guarding and pain complaints. (EX.27, p.1). When Claimant returned the next day, Claimant still could not "straighten [her leg] out". Claimant continued to be difficult to examine and Dr. Warfield suspected a "strong non-organic component". Dr. Warfield did not know for sure, however, and wanted her to see Dr. Cockrell. Dr. Warfield only released Claimant from work for one day and indicated that Claimant should return to her physician if she wanted to be covered for additional time off work. (EX.27, p.2).

Dr. Cockrell

Dr. Cockrell practices orthopedic medicine. (EX.15, p.1). The record contains documentation of his treatment of Claimant on approximately twenty-seven (27) occasions from May 7, 1999, to July 6, 2001. (EX.15, p.1-39).

When he first saw Claimant on May 7, 1999, Dr. Cockrell diagnosed a contusion to the right knee. His understanding of the accident was that Claimant had fallen 12 to 15 feet from a scaffold, landing on her left side. During the fall, she hit her right knee on a piece of angle iron. The notes did not mention left side or left shoulder symptoms. (EX.15, p.3). Claimant was placed on light duty at that time. (EX.15, p.3-4).

Dr. Cockrell performed arthroscopic surgery on Claimant's knee on May 26, 1999. (EX.15, p.5). He kept Claimant off work until June 16, 1999. (EX.15, p.7; TR.26,61). By July 7, 1999, she was returned to restricted duty. (EX.15, p.8). Dr. Cockrell assigned MMI to the knee on July 28, 1999. He assigned a 6% impairment to the lower extremity and a 2% whole person impairment. He placed no permanent restrictions on Claimant but noted that she may have difficulty with prolonged squatting. (EX.15, p.9).

On November 17, 1999, she returned to Dr. Cockrell complaining of pain. (EX.15, p.10). Dr. Cockrell performed a second arthroscopic procedure on Claimant's knee on January 21, 2000. (EX.15, p.14). He took her off work on the 20th and 21st for this surgery. (EX.15, p.13). After this surgery, Dr. Cockrell returned Claimant to light duty work until June 19, 2000, at which time he assigned permanent restrictions of minimal squatting and ladder climbing. (EX. 15, p.15-25). During this period, Claimant was sent to physical therapy and was evaluated by Dr. Murphy. (EX.15, p.21,22). On July 5, 2000, Dr. Cockrell established MMI for the leg a second time. He assigned her a 7% impairment rating for the lower extremity and a 3% impairment for the whole person. (EX.15, p.26).

Dr. Cockrell first noted left shoulder symptoms on August 11, 2000. He noted that Claimant may have previously mentioned such symptoms but he did not have any documentation from her initial visit. He also noted Employer's infirmary records. Claimant complained of shoulder and neck pain as well as numbness in her lower arm. X-rays of the neck and shoulder showed no acute process. However, Dr. Cockrell restricted Claimant to lifting no more that 50 pounds. On August 21, 2000, an MRI showed tendinitis but no tear. (EX.15, p.27). An MRI of the left shoulder taken on August 17, 2000, showed tendinitis in the rotator cuff but no tear, a small bony spur causing some impingement on the supraspinatus
tendon and mild AC joint arthritis. (EX.15, p.31). An MRI of the cervical spine taken on the same day was negative. (EX.15, p.32).

By September 25, 2000, Claimant still suffered pain in her shoulder and neck with numbness in her little finger. Claimant also felt swelling in her left trapezius region but Dr. Cockrell could detect no such swelling. Claimant's left hand grip was a little weak but nerve conduction studies had been negative. Dr. Cockrell was puzzled at this picture but felt Claimant had some mild cuff tendinitis. He could not explain the other symptoms. He felt he could do no more for Claimant and set her at MMI with restrictions of no lifting over 60 pounds and no sustained overhead work. He suggested a second opinion. (EX.15, p.36). Thereafter, Dr. Cockrell saw Claimant three times. He noted no changes in his opinion. (EX.15, p.36-39). On October 31, 2000, Claimant's knee had been swelling, but examination revealed no effusion. Dr. Cockrell told her that all he could do was give her more Vioxx, ice the knee and refill her pain medicine. (EX.15, p.36). On December 26, 2000, Claimant complained of shoulder problems and was trying to get a second opinion. (EX.15, p.37). When he last saw Claimant on July 6, 2001, Dr. Cockrell noted minimal swelling of the knee and detected no instability. He characterized the exam as "fairly benign" and believed nothing had significantly changed. X-rays looked good. Dr. Cockrell opined that he could do no more, maintaining his previously recommended restrictions. (CX.15, p.39).

Dr. Murphy

Dr. George Murphy is a board certified orthopedic surgeon who conducted an independent medical examination of Claimant on March 28, 2000, at the Department of Labor's request. (EX.16, p.1-2; CX.9, p.3-4). He was deposed on January 2, 2002. (CX. 9). In his report, Dr. Murphy noted treatment of Claimant's right knee only. He was not aware of any left arm or neck problems and made no mention of them in his evaluation. (EX.16; CX.9, p.9). At his deposition, Dr. Murphy opined that, based upon this history and absent previous medical records contradicting this history, any arm and neck complaints were unrelated to that accident. (CX.9, p.19). The examination showed a one inch atrophy on the right thigh. (CX.9, p.5).

Dr. Murphy opined that Claimant had not yet reached MMI. (EX16, p.2; CX.9, p.5). He recommended an aggressive physical therapy program with electrical stimulation treatment to build the quadriceps muscle. (EX.16, p.2; CX.9, p.6,19). He predicted a permanent disability rating of approximately 30% to her right leg. He stated she would be permanently restricted from climbing, standing

too long, walking too far and carrying. (EX.16, p.2; CX.9, p.7). Dr. Murphy disagreed that Claimant's impairment could be as low as Dr. Cockrell's 7% assessment. (CX.9, p.25). However, he expected Claimant to be able to return to gainful employment with whatever restrictions she was given after reaching MMI. (CX.9, p.22).

Dr. Murphy opined, upon reviewing Dr. Hillier's February 14 and 22, 2001 records, that Claimant's subsequent physical therapy was either unsuccessful or inappropriate because she continued to have an inch atrophy. (CX.9, p.10-12). Either Claimant had not participated in the therapy or the therapy had not been intensive or long enough to achieve sufficient muscle buildup. (CX.9, p.12).

Dr. Setzler

Dr. Roger Setzler performed an independent medical evaluation for Employer on June 21, 2000. (EX.17, p.3,5). Dr. Setzler noted left shoulder trouble from the injury but mainly addressed the right knee in his report. (EX.17, p.1). Physical examination revealed slight patellofemoral irritation and Claimant complained of joint tenderness. Lachman, anterior drawer, pivot shift, and McMurry's tests were all negative. He observed slight medial joint narrowing in the right knee joint. Dr. Setzler concluded that Claimant suffered from degenerative arthritis in her knee. He speculated that Claimant could have been asymptomatic before the accident and that the accident could have flared up the arthritis and started causing difficulties. Dr. Setzler concluded that Claimant had reached MMI and recommended continued physical therapy for strengthening and occasional use of anti-inflammatory medications. (EX.17, p.4).

Dr. Hillier

Dr. Robert Hillier is a board certified orthopedic surgeon and a Harvard Medical School graduate. (CX.8, p.4). He examined Claimant on February 14, 2001, and was deposed on January 1, 2002. (CX.6; CX.8).

When he saw Claimant, she walked with a light right leg limp. He observed atrophy or weakness in the right thigh muscle and swelling in the knee. Knee flexion revealed patello-femoral crepitus condition[4]. (CX.8, p.12). A patellar apprehension test[5] resulted in pain, which, Dr. Hillier explained, is consistent with a knee injury involving cartilage behind the knee cap. Dr. Hillier agreed with Dr. Murphy's 30% disability rating. (CX.8, p.13).

Physical examination of the left shoulder showed guarding and Dr. Hillier felt the shoulder slipping out of the joint anteriorly with force. She also had a painful arc of motion and an inability to rotate exteriorly. (CX.8, p.14). Dr. Hillier concluded that his findings were consistent with a

[4]Dr. Hillier characterized this condition as a crackling sensation. (CX.8, p.12).

[5]Dr. Hillier explained that this test involves moving the knee cap out of its track. (CX.8, p.13).

ligament injury and something trapped or inflamed above the rotator cuff. This finding, he testified, is compatible with

Claimant's work related accident. (CX.8, p.15). X-rays revealed Hill-Sachs lesion in the shoulder and no abnormalities in the knee. (CX.8, p.16). At that time, Dr. Hillier did not believe Claimant had reached MMI for either the shoulder or the knee. (CX.8, p.17-18). He was surprised that Claimant was working with her neck and knee problems and believed that she could not last long without doing something about these problems. (CX.8, p.20-21). Following the February 14 examination, Dr. Hillier allowed Claimant to continue to work. (CX. 8, p. 25). On March 7, 2001, Claimant submitted Dr. Hillier's February 14 report as support for her time off work. (EX. 34).

Dr. Hillier saw Claimant one more time on February 22, 2001. Her knee had locked up at work on February 19. (CX.8, p.21). She was unable to fully straighten her knee and was using a crutch. Dr. Hillier opined that Claimant's knee locked up because of the type of work she had been performing. (CX.8, p.22).

Upon reviewing MRIs taken of the neck and shoulder on August 17, 2000, Dr. Hillier observed a torn supraspinatus tendon in the rotator cuff. (CX.8, p.22-23). Dr. Hillier also observed broad based disc protrusions at C5-6 and C6-7. (CX.8, p.23). Dr. Hillier recommended repeating the MRIs to determine the significance of these protrusions and to see if the shoulder condition had deteriorated to explain Claimant's poor condition. (CX.8, p.24).

Dr. Hillier removed Claimant from work in order to review tests and determine "what this injury [was] all about." (CX.8, p.25-26). He wanted MRIs performed of the shoulder, cervical spine and right knee. None of these tests were performed and no follow up visit occurred because Claimant never received permission for them. (CX.8, p.26). Dr. Hillier opined at the deposition that these tests should still be performed if Claimant continued having problems. (CX.8, p.27).

IV. DISCUSSION

In arriving at a decision in this matter, it is well-settled that the fact-finder is entitled to determine the credibility of the witnesses, weigh the evidence, draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 666 F.2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 928 (1968). It has been consistently held the Act must be construed liberally in favor of the claimants. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc. Britton, 377 F.2d 144 (D.C. Cir. 1967).

However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 114 S.Ct 2251 (1994), aff'g, 990 F.2d 730 (3rd Cir. 1993).

CHOICE OF PHYSICIAN

Claimant alleges that Dr. Cockrell was never her chosen physician. Alternatively, she argues that sufficient good cause exists for her to change her choice of physicians. She also argues that she was entitled to chose a different physician for her February 19, 2001 accident.

Section 7(b) of the Act provides in pertinent part:

> "The employee shall have the right to choose an attending physician.... . If, due to the nature of the injury, the employee is unable to select his physician and the nature of the injury requires immediate medical treatment and care, the employer shall select a physician for him. The Secretary... may, on his own initiative or at the request of the employer, order a change of physicians.... when such change is desirable or necessary in the interest of the employee or where charges exceed those prevailing within the community... . Change of physicians at the request of employees shall be permitted in accordance with the regulations of the Secretary." 33 U.S.C. § 907(b).

Prior to the 1984 Amendments, the regulation at 20 C.F.R. § 702.406 detailed the procedures to be followed to obtain a change in physicians once a claimant has made his initial free choice of physicians pursuant to Section 7(b). The 1984 Amendments incorporated this regulation into Section 7(c)(2) of the Act.

Section 7(c)(2) of the Act provides in pertinent part:

> "Whenever the employer or carrier acquires knowledge of the employee's injury, through written notice or otherwise as prescribed by the Act, the employer or carrier shall forthwith authorize medical treatment and care from a physician selected by an employee pursuant to subsection (b). ... An employee may not change physicians after his initial choice unless the employer, carrier, or deputy commissioner has given prior consent for such change. Such consent shall be given in cases where an employee's initial choice was not of a specialist whose services are necessary for and appropriate to the proper care and treatment of the compensable injury or disease. In all other cases, consent may be given upon a showing of good cause for change." 33 U.S.C. 907(c)(2).

Initial choice of physician

Claimant argues that she never chose Dr. Cockrell as her treating physician because Employer's representative suggested him to her and because Dr. Cockrell's name was filled in on the choice of physician form after she signed it. Claimant also argues that Employer's requirement that she sign the form before it would provide treatment negates her choice. Furthermore, Claimant suggest that she made no

choice because she did not know that she had a right to chose her own treating physician. I disagree. Claimant testified at trial that she did not know of an orthopedist and that Employer's representative told her that Dr. Cockrell was near to her house. Claimant admitted that she knew Employer would arrange
an appointment with Dr. Cockrell when she signed the form. Employer subsequently made the appointment with Dr. Cockrell. Claimant received substantial treatment from Dr. Cockrell including two leg surgeries, treatment for her arm, two MRIs, one nerve conduction study, blood work, x-rays and therapy sessions. She did not try to change physicians until late October or early November, 1999, approximately six or seven months after beginning treatment with Dr. Cockrell. As in Hart v. Newport News Shipbuilding and Dry Dock Co., 28 BRBS 364 (1994), Claimant remained under the care of the suggested physician for a prolonged period of time and had two surgeries. Therefore, I find that Claimant, through her prolonged acceptance of treatment, ratified her selection of Dr. Cockrell as her choice of physician.

Good cause for change of physician

Claimant argues that good cause existed for her to change her treating physician from Dr. Cockrell because Dr. Cockrell stated on September 25, 2000, that he could do no more for her and suggested that she might want to get a second opinion. Dr. Cockrell assigned MMI after the second knee surgery on July 5, 2000 and MMI for the shoulder on September 25, 2000. When he assigned MMI for the shoulder, he noted, "I really don't feel like I have anything further to offer her at this point" and suggested that she may want to seek a second opinion. Given the circumstances of the selection of Dr. Cockrell as her physician, the difference in the degree of impairment found by Dr. Cockrell and Dr. Murphy, Claimant's assertion of continued pain, Dr. Cockrell's suggestion that he could provide nothing further and that Claimant seek a second opinion and Claimant's overall dissatisfaction with Dr. Cockrell, I find that the requisite good cause to change treating physician has been shown.

Employer argues that Claimant cannot choose Dr. Hillier as her treating physician because his office is over 25 miles from Claimant's house and Employer's facility.

The applicable regulation provides in pertinent part:

> In determining the choice of a physician, consideration must be given to availability, the employee's condition and the method and means of transportation. Generally, 25 miles from the place of injury, or the employee's home is a reasonable distance to travel, but other pertinent factors must also be taken into consideration.

20 C.F.R. § 702.403.

It is uncontested that Dr. Hillier's office in Bay St. Louis, Mississippi, is over 25 miles from Claimant's home in Mobile, Alabama, and Employer's facility in Pascagoula, Mississippi, where Claimant was injured. Bay Saint Louis is approximately 67 miles from Pascagoula/Moss Point and 95 miles from

Mobile. Excerpts of the Mobile phone book show that there are an ample number of orthopedists in Mobile, Alabama. Claimant testified at trial that she went to Dr. Hillier upon her attorney's advice but provided no other reason why she chose to see a doctor so far away from her home and the place of injury. Therefore, I find that Dr. Hillier is an unreasonably long distance from Claimant and that she has shown no pertinent factors justifying her going to him for treatment. Dr. Hillier cannot be Claimant's chosen physician. I note that Employer authorized Claimant to see Dr. West on June 26, 2001. However, the record does not show that she ever sought treatment from him. Claimant shall select a treating physician in the Mobile, Alabama, area.

NATURE AND EXTENT

The parties do not dispute causation. Having established work-related injuries, the burden rests with the Claimant to prove the nature and extent of her disability, if any, from those injuries. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1985). A Claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). James v. Pate Stevedoring Co., 22 BRBS 271, 2741(1989); Trask, at 60. Any disability before reaching MMI would thus be temporary in nature. The date of MMI is a question of fact based upon the medical evidence of record. Ballestros v. Willamette Western Corp., 20 BRBS 184 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979). An employee reaches MMI when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395 (1981).

Claimant asserts that she has not reached MMI on any of her injuries based on the opinions of Drs. Hillier and Murphy. Employer counters that Claimant reached MMI for all of her injuries by September 25, 2000, based on Dr. Cockrell's opinion. Employer offers Drs. Setzler and Murphy's opinions to support Dr. Cockrell's conclusion. Since I have found Dr. Cockrell was Claimant's treating physician and Dr. Cockrell has treated Claimant for the longest time, I rely mostly on his opinion to determine dates of MMI. However, I also give weight to Dr. Murphy's opinion as the independent medical examiner assigned by the Department of Labor. Dr. Hillier saw Claimant only two times and testified that he needed more tests in order to provide his opinion. Dr. Setzler saw Claimant only one time to perform a medical examination for Employer. Therefore, I place less reliance on Drs. Hillier and Setzler's opinions in making my decision.

Dr. Cockrell established MMI for the right knee two times before the February 19, 2001 examination. He established MMI on July 28, 1999, after the first knee surgery and on July 5, 2000, after the second knee surgery. Dr. Cockrell assigned a 7% permanent impairment to the knee on July 5, 2000. When Dr. Murphy examined Claimant on March 28, 2000, he opined that Claimant had not yet reached MMI for her knee but would after physical therapy. This therapy was provided. Dr. Setzler concluded

MMI had been reached at the time of his examination in June, 2000. Therefore, I find that Claimant's right knee reached MMI on July 5, 2000, for the April 29, 1999 knee injury. Dr. Cockrell established MMI for the shoulder on September 25, 2000. Dr. Cockrell's opinion is supported by the MRIs and the nerve conduction studies. Therefore, I find that the shoulder injury reached MMI on September 25, 2000.

After her second injury on February 19, 2001, Claimant was seen by Dr. Warfield on two occasions. Dr. Warfield noted no diffusion or instability in the knee and suspected a "strong non-organic component". Claimant was difficult to examine, refused emergency room treatment and drove herself home. Dr. Warfield only released Claimant from work for one day. Claimant refused to see Dr. Cockrell until I ordered her to submit to an examination that took place on July 6, 2001. Dr. Hillier did not physically examine Claimant when he saw her on February 22, 2001. He did not know what was wrong with claimant and removed her from work in order to determine "what this injury [was] all about." He wanted to take another MRI. When Dr. Cockrell saw Claimant on July 6, 2001, he noted only minimal swelling and detected no instability in the knee. He opined that nothing had significantly changed and maintained the same restrictions he had assigned previous to the second injury. The second knee injury had apparently healed. Since Dr. Cockrell opined that nothing had changed in Claimant's knee condition, I find that there was no residual injury from the February 19, 2001 injury and that her permanent disability is due to the April 29, 1999 accident. I find that the injury of February 19, 2001, only resulted in a one day temporary exacerbation of the pre-existing knee injury.

Claimant has suffered both "schedule" (right knee) and "non-schedule" (left shoulder) injuries. §908(c)(2) & (10); §908(c)(21). If a claimant suffers a "schedule" injury and a "non-schedule" injury arising from and caused by a single accident, the claimant may be able to recover for both concurrently. Green v. I.T.O. Corporation of Baltimore, 32 BRBS 67, 70(1988); Frye v. Potomac Electric Co., 21 BRBS 194, 198 (1988). However, a schedule award cannot run concurrently with a temporary or permanent total disability award. See Rathke v. Lockheed Shipbuilding & Construction Co. 17 BRBS 77 (1981). This rule is based on the theory that a claimant cannot be more than totally disabled. Thus, a schedule award cannot overlap or run concurrently with a total disability award. Cf. Hastings v. Earth Satellite Corp., 628 F.2d 273 (9th Cir. 1956), cited in Turney v. Bethlehem Steel Corp., 17 BRBS 232 (1985). Furthermore, where a schedule and a non-schedule injury are compensated separately, any loss in wage-earning capacity due to the schedule injury must factored out of the Section 8(c)(21) award. Frye, 21 BRBS 194, 196. Claimant's schedule injury reached MMI on July 5, 2000, while her non-schedule injury reached MMI on September 25, 2000. I have found that Claimant suffered no residual injury on the February 19, 2001.

I have given considerable weight to the opinion of Dr. Cockrell concerning most aspects of Claimant's medical condition as it is corroborated by other evidence of record. However, I disagree with Dr. Cockrell's impairment rating of 7 percent. When asked if the impairment rating could be that low, Dr. Murphy, the DOL appointed medical examiner, responded "There is no possible way." Dr. Murphy predicted a 30 percent impairment rating and Dr. Hillier agreed with the 30 percent

impairment rating. I find Claimant is entitled to disability compensation for her scheduled right leg injury of 30 percent.

The question of extent of disability is an economic as well as medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir. 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940). Disability under the LHWCA means an incapacity, as a result of injury, to earn wages which the employee was receiving at the time of the injury at the same or any other employment. 33 U.S.C. §902(10). In order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Economic disability includes both current economic harm and the potential economic harm resulting from the potential result of a present injury on market opportunities in the future. Metropolitan Stevedore Co. v. Rambo (Rambo II), 117 S.Ct. 1953, 1955 (1997). A claimant will be found to have either no loss of wage-earning capacity, no present loss but a reasonable expectation of future loss (de minimis), a total loss, or a partial loss.

A claimant who shows he is unable to return to his former employment has established a prima facie case for total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. P & M Crane v. Hayes, 930 F.2d 424, 430 (5th Cir. 1991); New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total compensation until the date on which the employer demonstrates the availability of suitable alternative employment. Rinaldi v. General Dynamics Corps., 25 BRBS 128 (1991).

Claimant's position as burner required her to regularly carry a 75 to 80 pound line and squat or stoop regularly. Dr. Cockrell permanently restricted Claimant to minimal squatting and ladder climbing on June 19, 2000. He assigned a 60 pound weight lifting limit on September 25, 2000. Therefore I find that Claimant cannot return to her previous position and has established a prima facie case for total disability.

SUITABLE ALTERNATIVE EMPLOYMENT

Once a claimant has established a prima facie case for total disability, the employer may avoid paying total disability benefits by showing that suitable alternative employment exists that the injured employee can perform. The claimant does not have the burden of showing there is no suitable alternative employment available. Rather it is the duty of the employer to prove that suitable alternative employment exists. Shell v. Teledyne Movable Offshore, 14 BRBS 585 (1981); Smith v. Terminal Stevedores, 111 BRBS 635 (1979). The employer must prove the availability of actual identifiable, not theoretical, employment opportunities within the Claimant's local community. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981), rev'g, 5 BRBS 418 (1977); Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327, 1330, 12 BRBS 660, 662 (9th Cir. 1980). The specific job opportunities must be of such a nature that the injured employee could reasonably perform them given his age, education, work experience, and

physical restrictions. Edwards v. Director, OWCP, 999 F.2d 1374 (9th Cir 1993), cert denied, 114 S.Ct. 1539 (1994); Turner, 661 F.2d at 1041-1042.

The employer need not place the claimant in suitable alternative employment. Trans-State Dredging v. Benefits Review Bd. (Tarner), 731 F.2d 199, 201, 16 BRBS 74, 75 (CRT)(4th Cir. 1984), rev'g, 13 BRBS 53 (1980); Turner, 661 F.2d at 1043, 14 BRBS at 165. However, the employer may meet its burden by providing the suitable alternative employment. Hayes, 930 F.2d at 430.

If the employer has established suitable alternative employment, the employee can nevertheless prevail in his quest to establish total disability if he demonstrates that he tried diligently and was unable to secure employment. Hooe v. Todd Shipyards Corp., 21 BRBS 258 (1988). The claimant must establish a reasonable diligence in attempting to secure some type of suitable employment within the compass of opportunities shown by the employer to be reasonably attainable and available, and must establish a willingness to work. Turner, 661 F.2d at 1043.

Employers may rely on the testimony of vocational experts to establish the existence of suitable jobs. Turney v. Bethlehem Steel Corp., 17 BRBS 232, 236 (1985); Southern v. Farmers Export Co., 17 BRBS 64, 66-67 (1985); Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231, 233 (1984); Bethard v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 691 (1980); Pilkington V. Sun Shipbuilding & Dry Dock Co., 9 BRBS 473; 477-80 (1978). See also Armand v. American Marine Corp., 21 BRBS 305 (1988) (job must be realistically available). The counselors must identify specific available jobs; market surveys are not enough. Campbell v. Lykes Bros. Steamship Co., 15 BRBS 380, 384 (1983); Kimmel v. Sun Shipbuilding & Dry Dock Co., 14 BRBS 412 (1981). See also Williams v. Halter Marine Serv., 19 BRBS 248 (1987) (must be specific, not theoretical, jobs). The trier of fact should also determine the employee's physical and psychological restrictions based on the medical opinions of record and apply them to the specific available jobs identified by the vocational expert. Villasenor v. Marine Maintenance Indust., 17 BRBS 99, motion for recon. denied, 17 BRBS 160 (1985). To calculate a claimant's wage earning capacity, the trier of fact may average the wages of suitable alternative positions identified. Avondale Industries v. Director, OWCP, 137 F.3rd 326 (5th Cir. 1998).

A job within an employer's facility continues to meet the employer's burden of proof where it is suitable and available even if the claimant fails to report to work. Walters v. Ingalls Shipbuilding, Inc., 31 BRBS 75 (CRT)(5th Cir. 1997). Once an employer establishes suitable alternative employment by providing light duty work which a claimant successfully performs but is subsequently discharged for breeching company rules and not for reasons related to his disability, the employer does not bear any new burden of providing other suitable alternative employment. Brooks v. Director, OWCP, 2 F.3d 64, 27 BRBS 100 (CRT)(4th Cir. 1993); See also Harrod v. Newport News Shipbuilding and Dry Dock Co., 12 BRBS 10, 14-16 (1980) (employer met burden by showing alternative job, even though the claimant was later fired for bringing a gun to work). Once a claimant is terminated for reasons unrelated to the work related disability, the employer no longer has a duty to show suitable alternative employment and has no duty to pay further compensation benefits. Darby v. Ingalls Shipbuilding, Inc., 99 F.3d 685, 30 BRBS 93 (CRT)(5th Cir. 1996).

Labor Market Surveys

Sanders, Employer's rehabilitation specialist, performed two labor market surveys for Claimant on December 1, 2000, and on December 12, 2001. In performing these surveys, he used Dr. Cockrell's restrictions of minimal squatting and climbing, no sustained overhead work and no lifting over sixty pounds. Claimant's own rehabilitation specialist, Cowart, opined on January 2, 2001, that Claimant had an initial wage earning capacity of $240 to $260 per week. On December 1, 2000, Sanders identified positions as a gas station cashier, a parking lot booth attendant, and a gate guard. I find that these positions were all suitable employment for Claimant and met her restrictions. Claimant does not dispute that these jobs are suitable alternative employment and does not dispute the reduction in benefits based on the wage earning capacity of $229.20 per week as shown by these jobs. (TR. 192).

Employer asserts that the December 1, 2000 labor market survey was retroactive to the date Claimant reached MMI, September 25, 2000. Employer argues that in his labor market survey, Sanders indicated at least six (6) of the jobs were available since September 25, 2000. An employer can establish the existence of suitable alternative employment retroactively. Newport News Shipbuilding & Dry Dock Co. v. Tann, 841 F.2d 540 (4th Cir. 1988). However, I find making the labor market survey retroactive would not be appropriate in this case. It was not until November 10, 2000, that Sanders informed Claimant that he was scheduling a vocational interview. I note that Claimant had been repeatedly brought back to work for Employer when her previous periods of disability ended. I do not find it unreasonable that Claimant would not immediately seek other employment immediately upon being released to work. Finally, there is no indication that Employer sought to make the survey retroactive prior to the hearing of the case. Accordingly, I find Employer did not establish suitable alternative employment until December 1, 2000.

Therefore, I find that Employer has shown that suitable alternative employment was available to Claimant beginning on December 1, 2000, and that she had a wage earning capacity of $229.20 per week.

Internal position

On January 22, 2001, Claimant returned to work for Employer in its return to work program. She was assigned to several jobs before being assigned to work as an arc gouger on February 19, 2001, the date of her second knee injury. Based on the description of the duties provided by Wiley and Walker, it is clear that this was necessary work and was not sheltered employment. Claimant testified that she had to kneel in order to reach the spot she was working on that day. When she asked for a break, her supervisor informed her that restricted workers did not have set breaks. Employer's representative, Wiley, agreed that supervisors are not allowed to authorize breaks but testified that employees can take them as needed. Wiley and Walker, the Department of Labor's vocational rehabilitation counselor, testified that work close to the ground could be reached without squatting or kneeling by sitting on a matt or bucket. Walker concluded that the internal position fit Claimant's restrictions. He explained that Claimant could

perform the low work on the date of the second injury by taking breaks as well as using a matt or bucket. Notes from Sanders' report of Claimant's work area on February 19, 2001, show that Dearman told Claimant that he needed the work completed when she asked to take a break. In that report, Sanders concluded that any required squatting would have lasted one and a half hours. Dr. Murphy opined that the prolonged kneeling led to her February 19, 2001 injury. However, Claimant refused to go to the hospital and managed to drive home on February 19, 2001, despite her injury. Considering all these facts, I find that the position provided at Employer's return to work program met Claimant's restrictions and constituted suitable alternative employment. In making this determination, I rely on Walker's opinion as the Department of Labor's specialist. I also found Wiley to be a credible witness and believe her testimony that injured workers are allowed to take breaks as needed, despite the lack of set breaks.

Wiley testified at trial that the internal position remains available. She also testified that Claimant was discharged on March 2, 2001, for absenteeism when she failed to return to work and failed to provide a doctor's excuse. While Claimant alleges she submitted Dr. Hillier's February 14 report as support for her time off work, the report in fact allows Claimant to continue to work in her modified job. When he examined Claimant on July 6, 2001, Dr. Cockrell opined that Claimant had fully healed from her February 19, 2001 accident and maintained her pre-injury restrictions. I find that Employer met it's burden of showing that suitable alternative employment was available to Claimant by giving her an internal position and that Claimant voluntarily quit that position by failing to return after her second injury.

ORDER

It is hereby ORDERED, JUDGED AND DECREED that:

1) Employer shall pay Claimant temporary total disability benefits from April 29, 1999, to September 25, 2000, based on an average weekly wage of $579.95.

2) Employer shall pay Claimant permanent total disability benefits from September 25, 2000, to December 1, 2000, the date Employer established suitable alternative employment, based on an average weekly wage of $579.95.

3) Employer shall pay Claimant compensation for permanent partial disability for her non-scheduled left shoulder injury from December 1, 2000, to January 21, 2001, based on an average weekly wage of $579.95 and a wage earning capacity of $229.20 per week. Employer shall also pay Claimant permanent partial disability compensation for her scheduled right leg injury of 30% pursuant to Section 8(c)(2) and (19) of the Act, from December 1, 2000, subject to the maximum rate of compensation allowable under Section 6(b) of the Act.

4) Employer shall receive a credit for benefits and wages paid.

5) Employer shall pay interest on any sums determined due and owing at the rate provided by 28 U.S.C. §1961.

6) Counsel for Claimant, within 30 days of receipt of this Order, shall submit a fully-documented fee application, a copy of which shall be sent to all opposing counsel who shall have 20 days to respond with objections thereto.

7) All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED this 10th day of May, 2002, at Metairie, Louisiana

A
LARRY W. PRICE
Administrative Law Judge

LWP:bab